Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

No.

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,

Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

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Questions Presented

1. Whether the State of Washington, Department of Social and Health Services is obligated under 45 C.F.R. § 232.12 to delete the needs of a caretaker relative receiving Aid to Families With Dependent Children and establishing protective payments for the children in those instances in which the caretaker relative who has assigned all support rights for the children under 45 C.F.R. § 232.11 then directly receives support money, fails to remit it to the state and expends the funds.

2. Does the failure to cooperate contemplated by 45 C.F.R. § 232.12(b) (4) mean the failure or refusal to pay over support money which is "presently" in the hands of the caretaker relative, or does it mean any failure to remit to the state agency even though the support money may have already been expended.

3. At what point can the sanction for failure to cooperate in turning over support money received by a caretaker relative be applied and what can cure the failure.

4. Are the State of Washington, Department of Social and Health Services regulations, WAC 388-14-200(2)(d) and WAC 388-14-200(3) and WAC 388-14-200(4) as interpreted by the state agency consistent with 42 U.S.C. § 602(a)(26) and 45 C.F.R. § 232.12.

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MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

The Petitioners, Gerald J. Thompson and Robert Querry, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on January 10, 1980.

Questions Presented

1. Whether the State of Washington, Department of Social and Health Services is obligated under 45 C.F.R. § 232.12 to delete the needs of a caretaker relative receiving Aid to Families With Dependent Children and establishing

protective payments for the children in those instances in which the caretaker relative who has assigned all support rights for the children under 45 C.F.R. § 232.11 then directly receives support money, fails to remit it to the state and expends the funds.

2. Does the failure to cooperate contemplated by 45 C.F.R. § 232.12(b) (4) mean the failure or refusal to pay over support money which is "presently" in the hands of the caretaker relative, or does it mean any failure to remit to the state agency even though the support money may have already been expended.

3. At what point can the sanction for failure to cooperate in turning over support money received by a caretaker relative be applied and what can cure the failure.

4. Are the State of Washington, Department of Social and Health Services regulations, WAC 388-14-200(2)(d) and WAC 388-14-200(3) and WAC 388-14-200(4) as interpreted by the state agency consistent with 42 U.S.C. § 602(a)(26) and 45 C.F.R. § 232.12.

Parties

The parties are identified in the caption. The action was certified as a class action.

Opinion Below

The opinion of the Washington State Supreme Court is reported in 93 Wn.2d 17, 604 P.2d 1288, and appears in Appendix C hereto.

Jurisdiction

The judgment of the Supreme Court of Washington was entered on January 10, 1980. A timely petition for rehearing *en banc* was denied on May 14, 1980 and the decision became final by issuance of the Supreme Court of Washington Writ of Mandate to the King County Superior Court dated May 19, 1980. On August 4, 1980, the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, granted an extension of time within which to file a Petition for Writ of Certiorari in the above-

entitled cause until and including September 11, 1980 (Appendix D), and this petition for certiorari will be filed by that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Statutory Provisions Involved

1. United States Provisions. 42 U.S.C.A. § 602(a)(26) (1977), 45 C.F.R. § 232.11 and 45 C.F.R. § 232.12 (1977), Appendix E.

2. State Provisions. Washington Administrative Code 388-14-200. The complete text of the regulation in effect in the time in question is attached as Appendix F.

Statement of the Case

The essential facts are as provided in the Findings of Fact set forth in the Findings of Fact and Conclusions of Law on Summary Judgment signed by the King County, Washington Superior Court on November 14, 1978 and filed on November 17, 1978 (with the exception of paragraphs 66 and 70), attached as Appendix A.

All of the respondent recipients of public assistance had assigned their child support rights to the Office of Support Enforcement of the Department of Social and Health Services pursuant to the requirements of 45 C.F.R. § 232.11 and Washington Administrative Code 388-14-200(1) (Finding No. 72, Appendix A), and all of them had agreed in writing to deliver to that state agency all support payments which might come into their possession during the time they were receiving public assistance.

All of the respondent recipients were determined to be members of a class of former, present and future AFDC recipients who have, are being, or may be taken off the AFDC grant, with the remaining portion of the family's grant being paid to a protective payee, including those recipients who have or may sign agreements with the Department's Office of Support Enforcement (OSE) promising to repay the amount of support monies not turned over, because of their

failure to turn over or have turned over support monies to OSE. (Finding No. 1, Appendix A).

As paragraph 59 of the Findings states on p. 8 (Appendix A):

> "If the caretaker relative fails to cooperate by not turning over support payments after the assignment of support rights has been made it is the policy of the petitioner state agency to determine that a condition of eligibility has not been satisfied and to delete the needs of the caretaker relative from the AFDC grant and pay the remaining portion of the grant to a protective payee."

As paragraph 62 states:

> "The needs of a caretaker relative could be restored to the AFDC grant if this person signed an agreement calling for monthly payments of at least ten percent of the amount of support payments not turned over, regardless of the recipient's financial ability to pay this monthly amount."

Paragraph 63 provides that, if the caretaker relative defaults on any of these monthly payments, that person's needs are again deleted from the grant and a protective payee is again set up until the recipient pays in one lump sum the entire amount of support payments not turned over regardless of the recipient's financial ability to pay the entire amount still owing. The amount by which the grant is reduced as a result of the recipient being taken off the grant is not credited toward reducing the amount of support not turned over to the state.

On November 28, 1977, the King County Superior Court entered a preliminary injunction which held in part:

> "1. Defendants, their successors, agents, and employees are hereby enjoined from taking AFDC recipients off the grant and setting up a protective payee to administer the remaining portion of the grant, because a recipient fails to turn over support payments to the Department's Office of Support Enforcement, pending final judgment in this action.

> 2. Defendants, their successors, agents, and employees are enjoined from taking AFDC recipients off the grant and setting up a protective payee to administer the remaining portion of the grant, because a recipient fails to comply with the repayment agreement calling for monthly payments of 10% or more of the amount of support payments not turned over, pending final judgment in this action."

By summary judgment signed November 14, 1978 and entered November 17, 1978, the King County, Washington Superior Court concluded that the policy of the petitioner and its regulations to the extent they authorized such policy (WAC 388-14-200 and WAC 388-33-453) violates the Social Security Act, federal regulations promulgated under the act and the equal protection and due process clauses of the United States and Washington State Constitutions (Appendix B). The petitioner was therein enjoined from deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

The Washington Supreme Court affirmed the November 14, 1978 decision of the King County Superior Court (Appendix C). The court held that "WAC 388-14-200(4) is void because it conflicts with the Social Security Act and HEW regulations." The court did conclude that WAC 388-14-200(2)(d) and 388-14-200(3) were valid.

As described above, both the state trial court and the State Supreme Court addressed the federal issues. The King County, Washington Superior Court concluded that the policy of the petitioner and its regulations to the extent that it authorized such policy violated the Social Security Act, federal regulations promulgated under the Act and the equal protection and due process clauses of the United States and Washington State's Constitution (paragraphs 4 and 5,

page 3, of the summary judgment—Appendix B). The State Supreme Court affirmed the King County Superior Court decision without qualification and specifically held that WAC 388-14-200(4) was void because it conflicted with the Social Security Act and HEW regulations. (Appendix D).

Reasons for Granting the Writ

The primary question is whether state regulations duly promulgated by the Department of Social and Health Services of the State of Washington as applied by the Department are in violation of particular provisions of the Social Security Act and regulations of the Department of Health and Human Services.

A "statute" as contemplated by 28 U.S.C. § 1257(3) includes duly enacted state regulations having the force of law. It was held in *King Manufacturing Company v. City Council of Augusta*, 277 U.S. 100, 104, 105, 72 L. Ed. 801, 48 S. Ct. 489 (1927), that statutes included "every act legislative in character to which the state gives its sanction." Accord, *Sultan Railway and Timber Company v. Department of Labor and Industries of the State of Washington*, 277 U.S. 135, 72 L. Ed. 820, 48 S. Ct. 505 (1927). In any event, we submit that this case involves a claim by the respondents relating to entitlement to benefits under the Social Security Act which would be contemplated under that portion of subsection (3) which provides

> "* * * or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

In order for a state to qualify for federal matching funds under the program of Aid to Families With Dependent Children under the Social Security Act, it must satisfy certain requirements. *Townsend v. Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971). From the outset of the case at hand, the petitioners' sole objective has been to attempt to satisfy applicable federal requirements entitling the state to federal financial participation. On December 8,

1977, a letter was received from Louis B. Hays, Deputy Director, Office of Child Support Enforcement of the Department of Health, Education and Welfare, Washington, D.C., which stated generally that compliance with the preliminary injunction entered by the King County, Washington Superior Court could cause the loss of all federal matching funds to which the State of Washington might be entitled under the Aid to Families With Dependent Children Program established in IV-A of the United States Social Security Act (Appendix G). We have no record of this letter subsequently being withdrawn, rescinded or modified. However, subsequent to the decision of the Washington Supreme Court, on June 20, 1980, a letter was addressed to the petitioner from the Regional Commissioner of the Social Security Administration of the U.S. Department of Health and Human Services setting forth its position regarding its interpretation of § 402(26)(b) of the Social Security Act and 45 C.F.R. § 232.12(d). (Appendix H). These two letters from two different units within the Department of Health and Human Services leave the petitioners in doubt as to the position of that agency in this regard.

Thereafter, a letter dated August 8, 1980 was directed to the petitioner from the same Regional Commissioner of the Social Security Administration indicating that that agency was unable to approve the plan of the petitioner " * * * until court-ordered restraints arising out of the case of *Berry v. Burdman*, with respect to sanctions for recipient failure to cooperate, are resolved." The letter further states that it is anticipated that an "action transmittal" will be issued jointly by the Office of Family Assistance and the Office of Child Support Enforcement in the near future to further clarify federal requirements (Appendix I).

Until such time as a clear acceptable final binding statement is forthcoming from that federal agency, the State of Washington is in jeopardy of being unable to satisfy federal requirements necessary for federal financial participation as a result of the opinion of the Washington Supreme

Court. We submit that this presents a substantial federal question warranting the granting of this petition.

We further submit that this court should exercise its judicial discretion and grant this petition under the guideline provided in Rule 17(1)(c) for the reason that a state court has decided an important question of federal law which has not been, but should be, settled by this court. To our knowledge, an interpretation of this federal law has not been previously addressed by this court. It is an important issue which should be settled by this court. It could affect all states participating in the AFDC program. Consistent with Rule 17(1)(c), this court has granted certiorari when it has been determined that the question is an important one of first impression. *American Federation of Musicians v. Whittstein*, 379 U.S. 171, 175, 13 L. Ed. 2d 214, 85 S. Ct. 300 (1964).

Conclusion

For these reasons, a writ of certiorari should issue to review the opinion of the Washington Supreme Court.

Respectfully submitted,
SLADE GORTON,
Attorney General

WALTER E. WHITE,
Assistant Attorney General
Attorneys for Petitioners

SEP 10 1980

Dated .....

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 823412

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated, *Plaintiffs,*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social & Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement, *Defendants.*

Plaintiff's Motion for Summary Judgment was heard on May 10, 1977. Upon request of the court, the parties agreed to have the motion heard as a Motion for Summary Judgment, instead of as Motion for Preliminary Injunction as originally noted. Plaintiff's Motion for Retroactive Relief was heard on December 27, 1977, at which time the court granted plaintiffs' request in an oral decision.

Plaintiffs appeared by their attorneys Tony Lee, Patrick McIntyre and Linda Dawson; defendants by their attorney Walter White, Assistant Attorney General.

The court makes the following:

FINDINGS OF FACT

1. Named plaintiffs and class members are former, present, and future AFDC recipients who have been, are being, or may be taken off the AFDC grant, with the remaining portion of the family's grant being paid to a protective payee, including those recipients who have or may sign agreements with the Department's Office of Support Enforce-

ment (OSE) promising to repay the amount of support monies not turned over, because of their failure to turn over or have turned over support payments to OSE.

2. Plaintiff Gertrude Pierce and her four minor children started receiving public assistance benefits under the AFDC program in 1970.

3. Beginning in 1973, Ms. Pierce's former husband began paying $100 per month in child support payments to the County Clerk in California who in turn transferred the funds to the Snohomish County Clerk.

4. Because Ms. Pierce had assigned her child support rights to OSE, the Snohomish County Clerk sent the child support payments directly to OSE beginning in December of 1973.

5. During a brief period in October, 1975, Ms. Pierce was off of public assistance during which time OSE notified the Snohomish County Clerk that the child support payments were to be made directly to Ms. Pierce because Ms. Pierce was no longer on public assistance.

6. On November 7, 1975, Ms. Pierce got back on public assistance and informed OSE of that fact.

7. Not having been informed by OSE, the Snohomish County Clerk continued to send the child support payments directly to Ms. Pierce.

8. When she received the check in December of 1975, Ms. Pierce called the county clerk to inquire about the check.

9. Ms. Pierce was told that the money was for child support, but was not otherwise told what to do with it although she advised the clerk that she was back on public assistance.

10. Ms. Pierce retained the December, 1975 check and subsequent checks which continued to be sent to her through June, 1976.

11. OSE notified the Snohomish County Clerk that support payments for July and subsequent months were to be sent directly to OSE; such payments have been sent directly to OSE since the notification.

12. The local office sent a notice to Ms. Pierce stating that Ms. Pierce was not "cooperating" with the Department and her needs would be deleted from the grant with the remaining portion of the grant to be paid through a protective payee.

13. Ms. Pierce asked for an administrative hearing challenging the Department's actions and the hearing was held on September 1, 1976.

14. The defendant upheld the local office's action, even though the local office at the fair hearing, conceded that there was no fraud involved and that the payments received by Ms. Pierce were caused by Departmental error in failing to have the Snohomish County Clerk send the child support payments directly to OSE.

15. Ms. Pierce has petitioned for review of the Department's decision to the Superior Court.

16. In accordance with the Department's policy, Ms. Pierce's portion of the grant was not being credited to the debt she allegedly owed until, upon Ms. Pierce's Motion for Stay of Administrative Decision, the Superior Court ordered the defendant to credit Ms. Pierce's monthly portion of the grant to the debt she allegedly owes.

17. Plaintiff Genevieve Gallow, at all times relevant to this action, has been receiving financial disability benefits for herself under the SSI program, which is administered by the federal government.

18. Ms. Gallow received medical assistance for herself from the Department and was the payee of AFDC public assistance benefits for her three minor children.

19. On September 29, 1976, Ms. Gallow received a notice from the Department stating the November public assistance check would be redirected to the local office because she had allegedly not cooperated with OSE by failing to turn over child support payments.

20. On October 4, 1976, Ms. Gallow asked for an administrative hearing challenging the Department's proposed action; the hearing was held on November 1, 1976.

21. The Department's decision found that Ms. Gallow had not turned over child support payments for the period between September 15, 1976 and January 22, 1976 and, therefore, was not cooperating with OSE.

22. The decision further found that Ms. Gallow has cooperated in the transfer of all child support payments received since January, 1976.

23. In fact, the child support payments paid by Ms. Gallow's former husband have been going directly to OSE since January of 1976.

24. The Department, as a result of the fair hearing decision, set up a protective payee for public assistance benefits previously paid to her on behalf of her three minor children, until she agrees to pay the amount of $750 in monthly payments of $75.

25. By this lawsuit, Ms. Gallow appeals pursuant to RCW 34.04.130 and 74.08.080 from the fair hearing decision (Docket No. 1076 A-159).

26. Plaintiff Carol Poe and her two minor children have been receiving public assistance benefits under the AFDC program.

27. In May of 1976, the Department notified Ms. Poe that her grant would be reduced by deleting her needs from the grant and a protective payee set up, unless she agreed to pay 10% of the amount owing per month, which she subsequently agreed to do.

28. Pursuant to the agreement, Ms. Poe began to pay $105 a month and continued to do so until December of 1976, and contended that the amount owing was $900, not $1,050.

29. In December of 1976, Ms. Poe sent in $50 toward her remaining obligation.

30. The Department notified Ms. Poe that her grant was being reduced and that the remaining portion would be paid through a protective payee, until she paid the entire remaining obligation in one payment.

31. Ms. Poe has asked for an administrative hearing challenging the Department's proposed action.

32. Plaintiff Maggie Lee Ferrill and her one minor child have been receiving benefits under the AFDC program.

33. In May of 1976, the Department alleged that Ms. Ferrill had failed to turn over child support payments received between October 1, 1975 and the end of March, 1976, and notified her that her needs would be deleted from the grant and a protective payee status would be set up.

34. Ms. Ferrill agreed to pay the Department the amount of $45 per month.

35. In November of 1976, the Department informed Ms. Ferrill that she was not cooperating and informed her that her grant would be reduced by $86, and that the remaining portion would be paid through a protective payee, because of her failure to perform the terms of the repayment agreement.

36. Ms. Ferrill's former husband began to send the child support payments directly to OSE in April of 1976, and has continued to do so.

37. Plaintiff Mavis Berry and her two minor children have been receiving public assistance benefits under the AFDC program for several years.

38. In May 1976, the Department informed Ms. Berry that her needs were being deleted from the grant and that the remaining portion would be paid to a protective payee because of her alleged failure to turn over child support payments to OSE.

39. Ms. Berry asked for an administrative hearing challenging the Department's proposed action.

40. The hearing was scheduled for February 15, 1977.

41. Since the early part of 1976, the child support payments paid by Ms. Berry's ex-husband have been paid directly to OSE by the King County Clerk, until Ms. Berry went off of the AFDC program.

42. Ms. Berry and her children voluntarily terminated themselves from AFDC in September of 1976. She was

informed that the non-cooperation sanctions would be imposed against her if and when she got back on AFDC.

43. Plaintiff Bonnie Hadeen received AFDC public assistance benefits for herself and her minor child from April through September, 1976, when she requested that the grant be terminated.

44. Ms. Hadeen received child payments of $600 for the months of May, June, August, and September, 1976, and $50 for July of 1976.

45. Ms. Hadeen turned over all payments to OSE except for the September payment.

46. Ms. Hadeen obtained a job around the end of September, 1976 and withdrew from public assistance in October of 1976.

47. In November 1976, after losing her job, Ms. Hadeen reapplied for assistance.

48. Since November 1976, all support payments have been sent to OSE directly by the father.

49. In December of 1976, the Department informed Ms. Hadeen that she had failed to cooperate when she was previously on public assistance from April through September of 1976, and that her grant would be reduced by deleting her portion from the grant and that a protective payee would be set up.

50. The Department informed Ms. Hadeen that she owed $250 and would have to agree to repay that amount.

51. Ms. Hadeen conceded that she owed $100 and offered to make arrangements to pay it but insisted that she had not received anything more.

52. Ms. Hadeen's offer was initially refused, but an agreement was subsequently reached that Ms. Hadeen was to pay $100 in monthly payments of $10.

53. Ms. Hadeen has made a request for an administrative hearing and the hearing has been held.

54. By this lawsuit, Ms. Hadeen appeals from the administrative decision rendered against her (Docket No. 0177 A-238).

55. Class member Pat McCorkle filed a Notice of Intent to Proceed as a Class Action with the Department in October, 1976.

56. Defendant Robert Querry is the Chief of the Office of Support Enforcement.

57. Defendant Milton Burdman was the Acting Secretary of the Department of Social & Health Services at the time this action was filed; Gerald Thompson is the present Acting Secretary of the Department.

58. An order has been signed by Judge Soderland in this action certifying the class, defined as follows:

> All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

59. If the caretaker relative fails to cooperate by not turning over support payments after the assignment of support rights has been made, it is the defendants' policy to determine that a condition of eligibility has not been satisfied and to delete the needs of the caretaker relative from the AFDC grant and pay the remaining portion of the grant to a protective payee.

60. Under defendants' policy, it is irrelevant whether the recipients' failure to turn over the support payments is caused by fraudulent intent or not.

61. The amount by which the grant is reduced, as a result of the recipient being taken off the grant, is not credited toward reducing the amount of support not turned over to OSE.

62. The needs of a caretaker relative could be restored

to the AFDC grant if this person signed an agreement calling for monthly payments of at least 10% of the amount of support payments not turned over, regardless of the recipient's financial ability to pay this monthly amount.

63. If the caretaker relative defaults on any of these monthly payments, that person's needs are again deleted from the grant and a protective payee is again set up, until the recipient pays in one lump sum the entire amount of support payments not turned over, regardless of the recipient's financial ability to pay the entire amount still owing.

64. As a result of being taken off the AFDC grant, the recipient loses his/her cash benefits and may lose other benefits which an AFDC recipient is entitled, such as assistance food stamps, medical coupons, and child care, depending on individual factors of eligibility.

65. HEW has approved DSHS Transmittal 75-53 on State Plan under Title IV-D of the Social Security Act, on December 31, 1975.

66. Defendants' policies are harsh and are causing named plaintiffs and class members substantial and irreparable injury, as AFDC recipients are by definition persons requiring subsistence assistance.

67. The court has already entered a preliminary injunction against defendants in November of 1977.

68. The hearing on plaintiffs' request for retroactive relief on behalf of the class was heard on December 27, 1977.

69. The court finds that the exact number of class members is unknown, but according to defendants' estimate, it is about 2,000.

70. The court finds that it is appropriate to award retroactive relief on behalf of class members.

71. Plaintiffs' counsel have spent 175 hours on this action.

72. The named plaintiffs signed OSE Assignment of Support Rights Form DSHS 14-119 as follows: Bonnie Hadeen — April 12, 1976; Genevieve Gallow — August 19, 1975; Mavis Berry—May 29, 1974; Maggie Lee Ferrill—August 28, 1975; Gertrude Pierce—June 25, 1975 and No-

vember 3, 1975; and Carol Poe—September 1, 1975 and October 20, 1975. Paragraph No. 2 states:

> "I agree to send or deliver to an office of the Office of Support Enforcement designated by the Department of Social & Health Services all support payments from the above-named absent parent which may come into my possession during the time I receive public assistance to or for the benefit of my children."

From the above, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over this action pursuant to RCW 34.04.130 and 74.08.080.

2. There is no genuine issue as to any material fact, and named plaintiffs and class members are entitled to summary judgment as a matter of law.

3. The class is certified and is defined as follows:

> All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

4. Defendants' policy of deleting the needs of the caretaker relative from AFDC grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually fails or has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights is made or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained, violates the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regu-

lations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

5. Defendants' regulations (WAC 388-14-200 and WAC 388-33-453) to the extent they authorize such policy, violate the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of a caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

7. Defendants shall immediately reinstate named plaintiffs and class members back into the grant and shall remove the protective payee status.

8. Defendants, their successors, agents, and employees are permanently enjoined from enforcing any agreement promising to pay the Office of Support Enforcement the amount of support retained and such agreements are hereby voided.

9. The administrative decisions rendered against named plaintiffs Genevieve Gallow (Docket No. 1076 A-159), Gertrude Pierce (Docket No. 0776 A-428), and Bonnie Hadeen (Docket No. 0177 A-238), are hereby reversed.

10. State law permits the retroactive reinstatement of public assistance benefits which have been denied or reduced because of the application of invalid practices or regulations.

11. The extent of class relief to be granted is within the sound discretion of the trial court; the court finds that the financial burden to defendants is not sufficient to preclude

the award of retroactive relief. It is appropriate in this case to award relief to class members to January 25, 1977, which is the date this action was filed.

12. Class members are entitled to retroactive relief; they are to be paid the difference between the cash benefits they received on or after January 25, 1977 and the cash benefits they would have received if they had not been taken off the grant pursuant to defendants' challenged policy.

13. Class members are also to be paid the value of food stamps, child care expense, and medical expenses they would have been entitled to on or after January 25, 1977, had they not been taken off the grant pursuant to defendants' challenged policy, less any of such benefits which were actually paid by defendants.

14. Named plaintiffs are to be paid cash benefits, value of food stamps, child care expenses, and medical expenses they would have been entitled to without the limitation of January 25, 1977.

15. Named plaintiffs and class members are to be paid the amount paid by them on or after January 25, 1977 under the monthly repayment agreements signed by them.

16. Defendants shall mail notices to class members who can be identified without making a search through individual local office (ESSO) files and OSE files.

17. As for those class members who cannot be so identified, the defendants shall provide constitutionally adequate notice concerning the availability of relief under this court's order. In the present case, constitutionally adequate notice includes insertion of a notice with all AFDC checks for one month, newspaper publication and posting of notices in all local welfare offices of DSHS as set forth more fully in the attached Order Administering Class Relief, which is hereby incorporated.

18. Class relief shall be administered under a claims system through which class members are to file claims for retroactive relief with their local offices of DSHS in order

to be entitled to relief. The Department shall be required to act on all claims with a reasonable period of time.

19. Persons whose claims for retroactive relief under this court's order are denied, shall be entitled to appeal the denial by means of administrative hearing and judicial review pursuant to RCW 74.08.080 and RCW 34.04.150.

20. Named plaintiffs are to be paid such benefits directly.

21. Any benefits awarded under this order shall not be counted as income or resources in any public assistance, food stamp, or medical assistance program administered by defendants.

22. The relief awarding back benefits shall be stayed pending decision on appeal; injunctive and declaratory relief shall not be stayed and shall remain in effect.

23. Plaintiffs are entitled to $6,500 in reasonable attorneys' fees, pursuant to RCW 74.08.080, as set forth more fully in the attached Order Awarding Attorneys' Fees, which is hereby incorporated.

DONE IN OPEN COURT this 14 day of November, 1978.

/s/ JUDGE NANCY HOLMAN

Presented by:

TONY LEE
Attorney for Plaintiffs

Approved for entry, notice
of presentation waived:

WALTER E. WHITE
Attorney for Defendants

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 823412

SUMMARY JUDGMENT

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated, *Plaintiffs,*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement, *Defendants.*

Plaintiffs' Motion for Summary Judgment was heard on May 10, 1977. Upon request of the court, the parties agreed to have the Motion heard as a Motion for Summary Judgment, instead of as Motion for Prelimiary Injunction as originally noted. Plaintiffs' Motion for Retroactive Relief was heard on December 27, 1977, at which time the court granted plaintiffs' request on an oral decision.

Plaintiffs appeared by their attorneys Tony Lee, Patrick McIntyre, and Linda Dawson; defendants by their attorney Walter White, Assistant Attorney General.

The court considered the following documents (parenthetical references are to the clerk subfile document numbers): Petition for Review and Complaint for Declaratory and Injunctive Relief and Damages (1); Stipulation of Parties (8); Order Certifying Class (9); Affidavit of Carol Poe (10); Affidavit of Patrick McIntyre (11); Affidavit of Maggie Lee Ferrill (12); Affidavit of Wardell Alexander (13); Plaintiffs' Brief in Support of Summary Judgment (17); Affidavit of Carole Greene (19); Defendants' Answer (2); Defendants' Affidavits and Briefs in Opposition to

Motion for Summary Judgment (24); Plaintiffs' Brief in Support of Motion for Preliminary Injunction (25); Administrative Decision, In re: Gertrude Y. Pierce, Docket No. 0776 A-428 (25); letter of Departmental representative Chris Currie (25); portion of Administrative Decision, In re: Pat McCorkle, Docket No. 1076 A-109 (25); Administrative Decision, In re: Deborah Kay Moran, Docket No. 1076 A-133 (25); Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (29); Memorandum Opinion (33); Affidavit of Tony Lee on Attorneys' Fees (37); Preliminary Injunction (39); Findings of Fact and Conclusions of Law (40); Plaintiffs' Brief in Support of Proposed Summary Judgment Order (42); Defendants' Memorandum in Opposition to Proposed Summary Judgment Order (44); Plaintiffs' Reply Brief on Back Benefits (47); and Plaintiffs' Interrogatories to Defendants (53); Plaintiffs' Brief in Support of Award of Attorneys' Fees ( ); Plaintiffs' Supplementary Brief in Support of Award of Attorneys' Fees ( ); Supplementary Affidavit of Tony Lee on Attorneys' Fees (with attached article) ( ); Affidavit of Pat McIntyre in Support of Attorneys' Fees Award ( ); Affidavit of Robert Jaffe on Attorneys' Fees ( ); Affidavit of Ron Mamiya ( ); Affidavit of Sally Pasette on Attorneys' Fees; Defendants' Memorandum in Opposition to Plaintiffs Claim for Attorneys' Fees ( ).

The court having already entered the Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. The class is certified and is defined as follows:

All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to

the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

2. The court has jurisdiction over this action pursuant to RCW 34.04.130 and 74.08.080.

3. There is no genuine issue as to any material fact and named plaintiffs and class members are entitled to Summary Judgment as a matter of law.

4. The court has entered a Preliminary Injunction in this action.

Defendants' policy of deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually fails or has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights has been made, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained violates the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

5. Defendants' regulations (WAC 388-14-200 and WAC 388-33-453) to the extent they authorize such policy, violate the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement or because the recipient fails or has failed to comply with

an agreement promising to pay the Office of Support Enforcement the amount of support retained.

7. Defendants shall immediately reinstate named plaintiffs and class members back into the grant and shall remove the protective payee status.

8. Defendants, their sucessors, agents and employees are permanently enjoined from enforcing any agreement promising to pay the Office of Support Enforcement the amount of support retained and such agreements are hereby void.

9. The Administrative Decisions rendered against named Plaintiffs Genevieve Gallow (Docket No. 1076 A-159), Gertrude Pierce (Docket No. 0776 A-428), and Bonnie Hadeen (Docket No. 0177 A-238), are hereby reversed.

10. State law permits the retroactive reinstatement of public assistance benefits which have been denied or reduced because of the application of invalid practices or regulations.

11. The extent of class relief to be granted is within the sound discretion of the trial court; the court finds that the financial burden to defendants is not sufficient to preclude the award of retroactive relief. It is appropriate in this case to award relief to class members to January 25, 1977, which is the date this action was filed.

12. Class members are entitled to retroactive relief; they are to be paid the difference between the cash benefits they received on or after January 25, 1977, and the cash benefits they would have received if they had not been taken off the grant pursuant to defendants' challenged policy.

13. Class members are also to be paid the value of food stamps, child care expenses, and medical expenses they would have been entitled to on or after January 25, 1977, had they not been taken off the grant pursuant to defendants' challenged policy, less any of such benefits which were actually paid by defendants.

14. Named plaintiffs are to be paid the cash benefits, value of food stamps, child care expenses, and medical expenses

they would have been entitled to without the limitation of January 25, 1977.

15. Named plaintiffs and class members are to be paid the amount paid by them on or after January 25, 1977 under the monthly repayment agreements signed by them.

16. Defendants shall mail notices to class members who can be identified without making a search through individual local office (ESSO) files and Office of Support Enforcement (OSE) files.

17. As for those class members who cannot be so identified, the defendants shall provide constitutionally adequate notice concerning the availability of relief under this court's Order. In the present case, constitutionally adequate notice includes insertion of a notice with all AFDC checks for one month, newspaper publication and posting of notices in all local welfare offices of DSHS as set forth more fully in the attached Order Administering Class Relief, which is hereby incorporated.

18. Class relief shall be administered under a claims system through which class members are to file claims for retroactive relief with their local offices of DSHS in order to be entitled to relief. The Department shall be required to act on all claims within a reasonable period of time.

19. Persons whose claims for retroactive relief under this court's Order are denied, shall be entitled to appeal the denial by means of administrative hearing and judicial review pursuant to RCW 74.08.080 and RCW 34.04.130.

20. Named plaintiffs are to be paid such benefits directly.

21. Any benefits awarded under this Order shall not be counted as income or resources in any public assistance, food stamp, or medical assistance program administered by defendants.

22. The relief awarding back benefits shall be stayed pending decision on appeal; injunctive and declaratory relief shall not be stayed and shall remain in effect.

23. Plaintiffs are entitled to $6,500 in reasonable attorneys' fees pursuant to RCW 74.08.080, as set forth more

fully in the attached Order Awarding Attorneys' Fees, which is hereby incorporated.

DONE IN OPEN COURT this 14 day of November, 1978.

/s/ JUDGE NANCY HOLMAN

Presented by:
TONY LEE, *Attorney for Plaintiffs*
Approved for entry, notice
of presentation waived:
WALTER E. WHITE, *Attorney for Defendants*

APPENDIX C

[No. 45275. En Banc. January 10, 1980.]

MAVIS BERRY, ET AL, *Respondents*, v. MILTON BURDMAN, ET AL, *Appellants*.

[1] Public Assistance—AFDC—Eligibility—State Requirements—Validity. In the absence of clear congressional authorization, a state may not impose conditions of eligibility upon recipients of AFDC which are more restrictive than the eligibility standards set forth in federal law.

[2] Public Assistance—AFDC—Eligibility—State Recovery of Support Payments—Validity. WAC 388-14-200(4), which requires a recipient of AFDC under certain circumstances to remit to the State the full amount of support payments received from an absent parent in order to remain eligible for further aid, conflicts with the Social Security Act and with regulations of the Department of Health, Education, and Welfare and is void.

Nature of Action: Recipients of AFDC brought a class action seeking to overturn certain rules of the Department of Social and Health Services involving payment to the State of support money received from an absent parent.

Superior Court: The Superior Court for King County, No. 823412, Nancy A. Holman, J., on November 17, 1978, granted summary judgment in favor of the plaintiffs and awarded them attorney fees.

Supreme Court: Holding that WAC 388-14-200(4) imposed conditions of eligibility for AFDC which were not authorized by federal statutes or regulations, the court *affirms* the summary judgment and *remands* the case for a determination of attorney fees on appeal.

Slade Gorton, Attorney General, and *Walter E. White, Assistant,* for appellants.

Tony Lee of *Evergreen Legal Services,* for respondents.

WRIGHT, J. — This is a class action, the certified class being:

> [a]ll former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social and Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

Summary judgment was granted to plaintiff class against the Department of Social and Health Services (DSHS) and the Office of Support Enforcement (OSE). The matter came directly to this court.

Plaintiffs-respondents contend on behalf of the class that certain DSHS rules violate the Aid for Families with Dependent Children (AFDC) provisions of the Social Security Act (42 U.S.C.A. § 601 *et seq.* (1977)) and rules of the Department of Health, Education and Welfare (HEW) included in 45 C.F.R. § 232.12 (1977).

The relevant part of the Social Security Act is 42 U.S.C.A. § 602(a) (1977), which reads in part:

> (a) A State plan for aid and services to needy families with children must * * * (26) provide that, *as a condition of eligibility* for aid, *each applicant or recipient will be required*—
>
> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,
>
> (B) *to cooperate with the State* (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) *in obtaining support payments for such applicant* and for a child with respect to whom such aid is claimed * * * and

that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) * * *

(Italics ours.)

Implementing this statute, the HEW secretary promulgated 45 C.F.R. § 232.12 (1977) which read in part:

The State plan must provide that:

(a) *As a condition of eligibility* for assistance, *each* applicant for or *recipient* of AFDC *will be required to cooperate* with the State *in*:

(1) Identifying and locating the parent of a child with respect to whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock with respect to whom aid is claimed;

(3) *Obtaining support payments* for such applicant or recipient and for a child with respect to whom aid is claimed; and

(4) Obtaining any other payments or property due such applicant or recipient of such child.

(b) *"Cooperate" includes* the following:

* * *

(4) After an assignment under § 232.11 has been made, *paying to the child support agency any child support payments received from the absent parent* which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligibile for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described

in § 234.60 of this chapter.
(Italics ours.)

Pursuant to these federal provisions, DSHS also promulgated rules. The provisions involved here are contained in WAC 388-14-200, which reads in part:

> This section establishes the initial and continuing requirements which affect eligibility for aid to families with dependent children.
>
> (1) Beginning August 1, 1975, as a condition of eligibility for assistance, each applicant/recipient shall make assignment to the office of support enforcement of any and all right, title, and interest in any support obligation the applicant/recipient may have in his or her own behalf or in behalf of any other family member for whom the applicant/recipient is applying for or receiving financial assistance including rights to support which have accrued at the time such assignment is executed.
>
> * * *
>
> (2) When (1), above is satisfied, *cooperation is further required as a continuing condition of eligibility* for assistance. *Cooperation includes* identifying and locating absent parents including possible putative fathers, and in establishing paternity of a child or children, and/or in *obtaining support payments* or any other payments or property due the applicant/recipient or child(ren) as further provided below:
>
> * * *
>
> (d) *Cooperation in the obtaining of support payments further includes but is not limited to:*
>
> (i) Providing of specific information at the time of application to establish the amount of the support debt accrued to the applicant/recipient prior to application for assistance.
>
> (ii) *Immediate remittance of all support payments received by the applicant/recipient from any person or agency to the office of support enforcement.*
>
> (3) If the applicant/recipient fails to cooperate as defined above the caretaker/relative shall be ineligible to receive assistance and any assistance for which the children may be eligible shall be provided by protective payment as specified in WAC 388-33-453; the determination of requirements for the child(ren) shall be computed

without regard to the requirements of the caretaker/relative.

(4) *If support monies are not promptly remitted and protective payments have been established* without regard to the requirements of the caretaker/relative pursuant to WAC 388-33-453, *the office of support enforcement may enter into a written agreement with the caretaker/relative for satisfaction of the obligation of remittance of support payments by monthly installment payments to the office of support enforcement in amounts not less than ten percent of the original amount not remitted. If a caretaker/relative makes such an agreement for satisfaction and is restored to grant status and fails to make the required monthly payments or again fails to promptly remit support monies received direct, said recipient is subject to WAC 388-33-453 and thereafter may establish cooperation under this subsection only by remittance to the office of support enforcement of the full amount of support monies received.*

(Italics ours.)

In question are WAC 388-14-200(2)(d) and 388-14-200 (3), which we hold to be valid, and WAC 388-14-200(4), which we hold to be invalid.

The Social Security Act makes cooperation a condition of AFDC eligibility. The act requires assignment of support money received from an absent parent and the HEW regulations extend this requirement to include paying that support money to the proper state agency—in this state, OSE. WAC 388-14-200(2)(d) and (3) are consistent with these requirements. It should be noted the present DSHS regulations as amended require remittance of support payments to OSE within 8 days rather than immediately.

[1, 2] WAC 388-14-200(4), however, presents a problem because it establishes new requirements for eligibility. The new requirements include entering into a written agreement to provide *inter alia* for repayment in monthly installment payments of not less than 10 percent of the original amount not remitted. In case of any default in the making of these payments or in remitting support money

thereafter, the whole amount must be paid in full. Such requirements are not imposed or authorized in either the Social Security Act or the HEW regulations.

In *Burns v. Department of Social & Health Servs.*, 20 Wn. App. 585, 581 P.2d 1069 (1978) the Court of Appeals said:

> The Social Security Act provides that "aid to families with dependent children shall be furnished with reasonable promptness to all *eligible individuals* * * * " (Italics ours.) 42 U.S.C. § 602(a)(10). The principle has been established that the states cannot exclude otherwise eligible individuals or families by imposing additional conditions of eligibility not contained in the Social Security Act. *Carleson v. Remillard*, 406 U.S. 598, 32 L. Ed. 2d 352, 92 S. Ct. 1932 (1972); *Townsend v. Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971); *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968). In *Townsend* the court stated the principle as follows:
>
> > [A]t least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.
>
> *Townsend v. Swank, supra* at 296.

(Footnote omitted.) *Burns*, at 588. In *Burns v. Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 95 S. Ct. 1180 (1975), the United States Supreme Court stated: "*King, Townsend* and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns v. Alcala, supra* at 580.

Here the clear indication is to the contrary. Congress has stated in the Social Security Act the AFDC program objectives:

> [f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives

> by enabling each State to furnish financial assistance and rehabilitation and other services * * * to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection * * *

42 U.S.C.A. § 601 (1977).

It is apparent that the harsh provision of the DSHS rules requiring immediate repayment of the full amount in certain instances most often makes it impossible for the recipient to regain eligibility. It is hard to understand how a department charged with service to people could promulgate such a cruel regulation. The rule is tantamount to an adhesion contract in its most oppressive form.

True, any provision for recovery of sums from public assistance recipients presents difficulties. These human beings generally receive only the bare minimum necessary for a reasonable existence. To take any part of that minimum away for repayment of any amount due the state results in hardship. This provision for repayment in full, however, exceeds the hardship of other repayment schemes and surpasses all bounds of reason.

We hold that WAC 388-14-200(4) is void because it conflicts with the Social Security Act and the HEW regulations. Having reached this conclusion we do not need to discuss plaintiffs' other contentions and affirm the trial court.

We also affirm the trial court's decision to allow attorneys' fees to respondents in the sum of $6,500. These are called for under RCW 74.08.080 and several cases decided by this court, including *Tofte v. Department of Social & Health Servs.*, 85 Wn.2d 161, 531 P.2d 808 (1975). In that case we said:

> We conclude that the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent — a corrective policy which would discipline

> respondent for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes. Appellant cites 14 cases brought by SCLS in superior courts in 1974, all appeals of respondent's welfare decisions. In all but one, SCLS was successful in obtaining a court reversal of the decision of respondent, but seldom, it seems, was awarded the statutory attorney fees. At present, it is contended, the private bar shuns welfare cases, leaving them to SCLS; the respondent thus has rarely been assessed fees where incautious, careless, or wrongful actions by its employees have improperly denied benefits and required correction by an appellate court. Clearly an incentive to more careful scrutiny is not out of place. Respondent admits that "a decision for the appellant would give the Department added cause to evaluate each case with more scrutiny."

Tofte, at 165. *See also Whitehead v. Department of Social & Health Servs.,* 92 Wn.2d 265, 595 P.2d 926 (1979).

We affirm the trial court and remand only for the purpose of fixing fees for respondents' counsel on this appeal.

UTTER, C.J., and ROSELLINI, STAFFORD, BRACHTENBACH, HOROWITZ, DOLLIVER, HICKS, and WILLIAMS, JJ., concur.

THE SUPREME COURT OF WASHINGTON

No. 45275

MAVIS BERRY, *et al,* *Respondents,*

v.

MILTON BURDMAN, *et al,* *Appellants.*

ORDER
DENYING MOTION FOR RECONSIDERATION

The Court having unanimously decided that the appellants' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 14th day of May, 1980.

/s/ ROBERT F. UTTER
Chief Justice

93 Wn.2d 17

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 45275

King County No. 823412

MANDATE

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, *Respondents*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of Office of Support Enforcements, *Appellants.*

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 10, 1980, became the decision terminating review of this court in the above entitled case on May 14, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

An order Denying Motion for Reconsideration was entered in this case on May 14, 1980; copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of May, A.D. 1980.

/s/ JOHN J. CHAMPAGNE
Clerk of the Supreme Court,
State of Washington

cc:
Hon. Slade Gorton
Attorney General
Mr. Walter E. White, *Asst.*
Evergreen Legal Services
Ms. Deborah Maranville
Reporter of Decisions

APPENDIX D

SUPREME COURT OF THE UNITED STATES
No. A-121

GERALD THOMPSON, Secretary, Department of Social & Health Services, *et al.*, *Petitioners,*

v.

MAVIS BERRY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 11, 1980.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 4 day of August, 1980.

APPENDIX E

42 § 602 PUBLIC HEALTH AND WELFARE

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

§ 232.11 Assignment of rights to support.

(a) The State plan must provide that:

(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have:

(i) In his own behalf or in behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance; and

(ii) Which have accrued at the time such assignment is executed.

(2) If the relative with whom a child is living fails to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(3) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, any aid for which such child is eligible (determined without regard to the needs of the ineligible relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

(4) For new applicants, the requirements of paragraph (a) of this section shall be effective August 1, 1975; and for current recipients, it shall be effective as determined by the State agency but not later than the time of the next redetermination of eligibility required by § 206.10(a)(9) of this chapter and in any event not later than February 1, 1976.

(b) An assignment by operation of state law which is substantially identical to the requirements of paragraph (a)(1) may be utilized in lieu of the assignment described in that paragraph.

(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations.

[40 FR 27154, June 26, 1975, as amended at 40 FR 52376, Nov. 10, 1975]

§ 232.12 Cooperation in obtaining support.

The State plan must provide that:

(a) As a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate with the State in:

(1) Identifying and locating the parent of a child with respect to whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock with respect to whom aid is claimed;

(3) Obtaining support payments for such applicant or

recipient and for a child with respect to whom aid is claimed; and

(4) Obtaining any other payments or property due such applicant or recipient of such child.

(b) "Cooperate" includes the following:

(1) Appearing at the offices of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by him, that is relevant to achieving the objectives of paragraph (a) of this section;

(2) Appearing as a witness at court or other hearings or proceedings necessary to achieving the objectives of paragraph (a) of this section;

(3) Providing information, or attesting to the lack of information, under penalty of perjury; and

(4) After an assignment under § 232.11 has been made, paying to the child support agency any child support payments received from the absent parent which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

APPENDIX F

WAC 388-14-200 ELIGIBILITY—ASSIGNMENT OF SUPPORT RIGHTS—COOPERATION WITH OFFICE OF SUPPORT ENFORCEMENT —EFFECT OF NONCOOPERATION (AMD 6-26-78)

This section establishes the initial and continuing requirements which affect eligibility for aid to families with dependent children.

(1) Beginning August 1, 1975, as a condition of eligibility for assistance, each applicant/recipient shall make assignment to the office of support enforcement of any and all right, title, and interest in any support obligation the applicant/recipient may have in his or her own behalf or in behalf of any other family member for whom the applicant/recipient is applying for or receiving financial assistance including rights to support which have accrued at the time such assignment is executed.

(a) Each ongoing applicant/recipient after August 1, 1975 must make this new assignment. Assignments will be necessary as a condition of continued aid due no later than the date of the next eligibility review. See WAC 388-24-108.

(b) The new assignment must be made before the applicant/recipient is eligible to receive bonus payments.

(2) When (1), above is satisfied, cooperation is further required as a continuing condition of eligibility for assistance unless the ESSO determines that the applicant/recipient has good cause not to cooperate under WAC 388-24-111. Cooperation includes identifying and locating absent parents including possible putative fathers, and in establishing paternity of a child or children, and/or in obtaining support payments or any other payments or property due the applicant/recipient or child(ren) as further provided below:

(a) Cooperation in identifying and locating absent parents including putative fathers includes, but is not limited to:

(i) Providing all known relevant information such as the absent parent's name including known aliases, address, telephone or message number; social security number, employment history, physical description, and data regarding the date and place of marriage, separation, divorce, and dissolution including copies of documents and court orders establishing paternity and/or support obligations, if any. Information must be given at the time of application or at a later time if requested by the office of support enforcement to supplement existing information;

(ii) Providing notice to the office of support enforcement of any and all necessary information concerning the absent parent(s), including all men who could possibly be the putative father of a child on whose behalf the recipient applied for or receives public assistance, and also providing notice of changes in the information and/or notice of new information as available.

(b) Cooperation in establishing the paternity of a child or children including, but not limited to: taking all reasonable action in cooperation with the office of Support enforcement, the prosecuting attorneys, the attorney general, courts or other agencies, in administrative hearings, or in actions to prosecute or maintain any legal action or remedy for the establishment of paternity or in investigation preparatory to or supplementary to such hearings or actions, and to develop medical and anthropological evidence relating to the alleged father's paternity based upon tests performed by experts on the mother and the child.

(c) Cooperation in establishing and collecting support and/or in obtaining support payments or any other payments or property due the applicant/recipient or child(ren) includes taking all reasonable action in cooperation with the office of support enforcement, the prosecuting attorneys, the attorney general, courts or other agencies in administrative hearings or in actions to prosecute or maintain any legal action or remedy for the establishment or collection of support obligations or in investigations

preparatory to or supplementary to such hearings or actions.

(d) Cooperation in the obtaining of support payments further includes but is not limited to:

(i) Providing of specific information at the time of application to establish the amount of the debt accrued to the applicant/recipient prior to application for assistance.

(ii) Immediate remittance of all support payments received by the applicant/recipient from any person or agency to the office of support enforcement.

(3) If the applicant/recipient fails to cooperate as defined above the caretaker/relative shall be ineligible to receive assistance and any assistance for which the children may be eligible shall be provided by protective payment as specified in WAC 388-33-453; the determination of requirements for the child(ren) shall be computed without regard to the requirements of the caretaker/relative.

(4) If support monies are not promptly remitted and protective payments have been established without regard to the requirements of the caretaker/relative pursuant to WAC 388-33-453, the office of support enforcement may enter into a written agreement with the caretaker/relative for satisfaction of the obligation of remittance of support payments by monthly installment payments to the office of support enforcement in amounts not less than ten percent of the original amount not remitted. If a caretaker/relative makes such an agreement for satisfaction and is restored to grant status and fails to make the required monthly payments or again fails to promptly remit support monies received direct, said recipient is subject to WAC 388-33-453 and thereafter may establish cooperation under this subsection only by remittance to the office of support enforcement of the full amount of support monies received.

(5) In the event of failure to cooperate under the requirements of this section and/or WAC 388-24-108 and/or 109, "aid to families with dependent children" does not mean payments with respect to a parent (or other individual whose needs should be considered in determining the need of the child(ren) or relative claiming

aid) of a child or children. Nothing in these rules shall be construed to make an otherwise eligible child ineligible for protective payments because of the failure of such parent (or such other individual) to cooperate or make assignment.

APPENDIX G

Mr. Robert E. Querry
Chief
Office of Support Enforcement
Department of Social and Health Services
Post Office Box 9162-FU-11
Olympia, Washington 98504

Dear Mr. Querry:

This is in response to your letter of November 30, 1977. At your request, we have reviewed the preliminary injunction issued by the court in the case of *Berry v. Burdman.* This letter sets forth our views on the possible effects that compliance with the injunction could have on the State of Washington's continued eligibility for Federal Funding.

It is our preliminary view that compliance with the injunction issued by the court might cause the State difficulties in several ways. Among other possibilities, a question is raised as to: a possible audit penalty, a conformity hearing (which could cause a loss of all title IV-A funds), and a loss of Federal financial participation (with respect to specific payments).

With respect to the audit penalty, HEW is required by section 403(h) of the Act to reduce by 5 percent Federal funding under title IV-A for any State which is found to have a child support program which does not meet the requirements of title IV-D. By following the terms of the injunction, Washington could encounter difficulties in complying with the following requirements:

1. 45 CFR 302.32, which requires that child support payments be made to the IV-D agency;
2. 45 CFR 302.37 and 51, which require that child support be distributed by the State in a manner prescribed by section 457 of the Act; and
3. 45 CFR 303.6, which requires the State to have a system for identifying, within 30 days, those cases in which there is a failure of an absent parent to comply with the support obligation.

As indicated above, there could be a loss of all the State's Federal funding under title IV-A. Section 404 of the Act allows the Secretary of this Department, after notice and opportunity for hearing to the State, to terminate funding under title IV-A for failure to comply with any of the requirements of section 402 of the Act. This is so because of section 402(a)(26), which imposes a State plan requirement that applicants for, and recipients of, Aid to Families with Dependent Children cooperate with the State. Regulations at 45 CFR 232.12(b)(4) define such cooperation to include "* * * paying to the child support agency any child support payments received from the absent parent which are covered by such assignment." Federal regulations further require that failure to so cooperate must result in removing the needs of the non-cooperating recipient from the grant, and making any further payments in the case by means of protective payment.

If a compliance action is taken against a State, HEW has to determine whether the State is violating plan requirements. Section 404(a) provides that all Federal funding under title IV-A could be terminated if the Secretary finds such a violation.

Another problem involves ineligible recipients of Aid to Families with Dependent Children (AFDC). Under the Federal regulations previously cited, a recipient who fails to pay child support payments received from the absent parent to the child support agency is supposed to be ineligible to continue to receive AFDC. Therefore, if the State does not remove such a recipient from AFDC, the Federal share of assistance payments for the recipient could be subject to disallowance

The court order causes substantial problems in the administration of the State's title IV programs. If this injunction stays in effect, HEW would have to assess what action should be taken. While several possibilities are indicated above, it is possible that other or additional measures would be appropriate, depending on the circumstances.

Please advise if you have any further questions about this matter.

Sincerely yours,
Louis B. Hays
Deputy Director
Office of Child Support Enforcement

APPENDIX H

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE REGIONAL
COMMISSIONER

June 20, 1980

Refer to: SFDX11-2

Gerald J. Thompson
Secretary
Department of Social and Health Services
Attn: Gladys McCorkhill, Director
Bureau of Income Maintenance
Mail Stop OB-44
Olympia, Washington 98504

Dear Mr. Thompson:

For some time, the staff of our respective departments have been discussing non-cooperation, Title *IV-A* sanctions and the treatment of child support received and retained by caretaker relatives. The purpose of this letter is to clarify the current Federal position with respect to the concerns that have emerged from those discussions.

The sanction for non-cooperation is addressed *in Federal law at Section 402(26)(b) of the Social Security Act and* in Federal regulations at 45 CFR 232.12(d) which require that the State Plan:

> "* * * shall provide that, if the caretaker relative fails to cooperate as required * * * the State or local agency will: (1) Deny assistance to the caretaker relative without regard to other eligibility factors; and (2) Provide payments as described in 234.60 of this chapter. Such assistance will be determined without regard to the needs of the caretaker relative."

This means, for example, that if a mother fails, without good cause, to cooperate by turning over to the IV-D agency child support payments received directly from the responsible absent parent, her needs must be removed from the assistance unit at the time non-cooperation is established. We find no provision in Federal law or Federal regulations that

precludes the State's prerogative to remove the caretaker's needs from the grant for a month and then include her needs with the assistance unit for the month following the month in which she restores cooperation. Such a time interval should provide the support enforcement agency the time needed to assure that the absent parent makes payment directly to the IV-D agency.

We need not address the *duration* of non-cooperation. The regulations at 45 CFR 232.12 state that the requirement of cooperation is met when the caretaker relative either agrees to cooperate or performs the acts of cooperation defined therein. Eligibility, as discussed in 45 CFR 206.10 and 233.90, is based on current *circumstances* rather than past or future ones.

Therefore, a non-cooperative caretaker relative restores cooperation by agreeing to cooperate henceforth; such a caretaker is deemed to be cooperative until such time as she fails to turn over child support money received thereafter to the IV-D agency. We do not envision that it would take the IV-D agency an inordinately long period of time to take the necessary steps to prevent the support payments from being given directly to the caretaker relative.

Further, there is no provision in either Federal law or regulation which permits or requires that an individual be sanctioned for failing to repay child support received directly under either parts A or D of Title IV.

We fail to find in Federal law or regulations anything which would require or permit *recoupment* through IV-D. However, it is Title IV-A policy that child support payments received directly by and retained by the caretaker relative are to be counted as income to meet need. This policy is also reflected in Quality Control instructions at Section E of Action Transmittal 78-31, dated August 4, 1978, and provides that if a Quality Control Reviewer finds that child support payments received directly and retained are not accounted for, there is an error. In Section F of the same

Action Transmittal, the Reviewer must verify the removal of the needs of the caretaker from the grant if the State has determined non-cooperation without good cause. If caretaker relatives retain such income and it is not counted to meet need because the agency is unaware of its receipt, the agency should recoup such "overpayment" through its recoupment policy if the State has elected such a policy.

The IV-A agency *must* count, as income to meet need, any support payments received by the recipient until the effective date for the recipient to begin submitting the money to the IV-D agency. The recipient is obligated to report to the IV-A agency when she begins giving the money to the IV-D agency because this is a change in circumstances.

In notifying the IV-A agency that the individual is not cooperating, the IV-D agency should forward a written copy of their findings to the IV-A agency. The IV-A agency should assess the situation and make a determination regarding cooperation; that agency should then notify the IV-D agency of the decision and the action taken.

Any of the changes in the assistance payment which result from various cooperative IV-D/IV-A recipient activities, including recoupment of overpayments resulting from unreported child support income retained by a recipient, must be carried out according to AFDC State Plan requirements. Child Support Enforcement agency activities with AFDC recipients do not exempt the IV-A agency from meeting the requirements of 45 CFR 205.10 with respect to notices or 45 CFR 206.10 with respect to changes in circumstances. It is imperative that both the IV-A and IV-D agencies be aware of this and specify in writing for their respective staffs the time frames which must be considered in their exchange of information and ensuing payment actions in order to avoid causing undue hardship to families.

I trust this policy clarification will assist your Department in meeting Federal requirements. Failure of the State to

conform to such requirements would necessitate this Department's citing of a question of compliance.

Sincerely,
DONALD C. SUTCLIFFE
Regional Commissioner

APPENDIX I

Refer to: SFDX11-2

August 8, 1980

Gerald J. Thompson
Secretary
Department of Social and Health Services
Mail Stop OB-44
Olympia, Washington 98504

Dear Mr. Thompson:

We are requesting a 90 day extension of the Federal review period for State Plan Transmittal 80-3, regarding assignment of support rights by AFDC recipients. We are unable to approve this Plan until court-ordered restraints arising out of the case of *Berry v. Burdman*, with respect to sanctions for recipients failure to cooperate, are resolved. At last reading, it appears that your Department may not be able to pursue in good faith the commitment found in the State Plan provisions in Section 2.7A and B of the Plan preprint which reflect the requirements found in Federal regulations at 45 CFR 232.2(a) and (b).

As we have been informed by our headquarters in Washington, D.C. that an Action Transmittal, to be issued jointly by the Office of Family Assistance and the Office of Child Support Enforcement, will be forthcoming in the near future to further clarify Federal requirements; we would prefer to delay action on this Plan until then rather than recommend disapproval. In the meantime, should the court modify its order in the *Berry* case, thereby permitting State compliance with Federal requirements, this Department should be furnished with a copy of the modification so that approval of Transmittal 80-3 could be effectuated.

Sincerely,
DONALD C. SUTCLIFFE
Regional Commissioner

cc.
Dave Anderson, BIM